FIRST REMARKS OF AN ITALIAN ADMINISTRATIVE COURT ON THE ICA'S NEW POWER TO FILE A CLAIM AGAINST ADMINISTRATIVE MEASURES HINDERING COMPETITION

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Article 35 of Law Decree No. 201 dated 6 December 2011 - put in place by government Monti and enacted by the Italian Parliament with Law No. 214 dated 22 December 2011 - introduced Article 21*bis* in the Italian antitrust Law.[2] This provision empowers the Italian Competition Authority (ICA) to bring to any administrative entity's attention the competition hindrance of an administrative measure or regulation. Should the relevant administrative entity not comply with the instructions given by the ICA within sixty days, the ICA can file a claim against it.

The first case in which the ICA applied the new provision concerned an administrative measure adopted by the Ministry of Transports which fixed minimum prices for trucking services. After the ICA had notified the Ministry that the measure hindered competition, the Ministry did not comply with the instructions received; therefore, the ICA filed a claim against the Ministry before the administrative Court of First Instance (Tribunale Amministrativo Regionale del Lazio or TAR).

On 15 March 2013, the Court ruled that the claim submitted by the ICA was well founded, and for the first time expressed interesting remarks concerning the new powers conferred to the ICA.[3]

Preliminarily, the Court ruled that Article 21*bis* is compatible with the Italian Constitution, and, in particular, with Article 103, thereby rejecting what argued by the defendant. According to the Court, the ICA's claim did not represent a case of "objective jurisdiction" - protecting a general interest – which would be exceptional in the Italian judicial system; on the contrary, it aimed at protecting an interest, which, on one hand, is a public interest but, on the other, is a specific, particular and individual interest of the ICA's (the interest in a competitive market).

After these general preliminary remarks, concerning the rationale of the ICA's new powers attributed by the new provision, the Court addressed three main specific issues related to the actual exercise of such powers.

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[1] Italian Competitin Authority

[2] Law No. 287 dated 10 October 1990.

[3] TAR of Lazio, III ter, Decision No. 2720, dated 15 March 2013.

The first issue which the Court dealt with was related to the possibility for the ICA to file a "direct" claim against administrative measures, *i.e.* not only after notifying the administrative entity that a measure hinders competition, but also without preliminarily exercising its advocacy power.
Acknowledging that Article 21*bis* is unclear on this point, the Court admitted that if Article 21*bis* were interpreted as a provision attributing two different powers (the power of triggering legal action directly and the power of triggering legal action after giving its instructions), this could grant the ICA flexibility, enabling it to adapt different solutions to different situations, according to the urgency and complexity of the case. Nevertheless, despite this assumption, the Court concluded that the ICA's right to file a claim must be considered an "*extrema ratio,*" as it leads to a trial between public entities, while it would be preferable to seek the purpose of granting free competition through a fair cooperation between public entities, stimulating a spontaneous compliance with the ICA's instructions.
On this basis, the Court came to the conclusion that under Article 21*bis* the ICA's right to file a claim is subject to the prior exercise of its advocacy power.

Such a conclusion was confirmed by a later decision in which the same Court[4] explicitly affirmed that a direct claim, on the basis of Article 21*bis*, is inadmissible where the ICA has not already expressed its comments, pointing out how and why the administrative measure infringes antitrust principles.

Secondly, the Court gave important explanations concerning the procedural timing of the ICA's powers of advocacy and of filing a claim.
Pursuant to Article 21*bis*, the ICA has sixty days to exercise its power of advocacy. According to the Court, this time limit runs from the moment the ICA acquires "effective knowledge" of the administrative measure hindering competition, which can be different from the time of the official publication of the administrative measure.
Should the time limit expire, this does not lead to the loss of either the power of advocacy or the right to claim.

Article 21*bis* also establishes that, if the administration does not comply with the ICA's advice within sixty days from its notification, the ICA can file its claim against the anti-competitive measures within the following thirty days. With regard to this second time limit, the Court noted that it runs from the moment in which the first time limit of sixty days has expired. This means that if the administrative entity adopts a negative decision after receiving the ICA's instructions - declaring its unwillingness to comply with the latter - the ICA does not need to rush in filing a claim against this decision, since the administrative entity can still comply until the expiry of the sixty-day deadline. Indeed, the law confers to the administrative entity a "*spatium deliberandi*" which can be used in full, through a sort of dialectic debate with the ICA.

[4]TAR of Lazio, II, decision No. 4451 dated 6 May 2013. Against this decision the ICA filed an appeal.

In other words, the thirty-day time limit to file a claim against the anti-competitive administrative measure runs only after the expiry of the previous sixty-day limit, *i.e.* after the conclusion of the whole pre-litigious phase.

The Court's third remark concerned the provision, in Article 21*bis*, of the ICA's legal support provided by the Attorney General.
The Court deemed that, as the ICA's claim is usually filed against an administrative entity which is subject, just like the ICA, to the obligation of legal support provided by the Attorney General, and as this could bring to a potential conflict of interests, the burden to resort to private legal support usually lies on the defendant administrative entity.
However, if - as in the case ruled by the Court – a private individual has already filed a claim against the anti-competitive administrative measure and the administrative entity in question is already represented by the Attorney General, that burden lies on the ICA, irrespective of the general rule.

With regard to the case under discussion, the Italian Court referred the case to the European Union's Court of Justice for a preliminary ruling under Article 267 TFEU regarding the issue whether the Italian Law on trucking service[5] - on which the administrative measure was based – is compatible with Article 4(3), 101, 49, 56 and 96 of the TFEU. The judgment is still pending[6].

[5]See Article 83*bis*, introduced from Law Decree No. 112 dated 25 June 2008, ratified with Law No. 133/2008 and then modified by Law No. 127/2010 and Law No. 148/2011.

[6] Cristina Lo Surdo, *First remarks of an Italian administrative court on the ICA's new power to file a claim against administrative measures hindering competition*. DOI: 10.12870/iar-9934.